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Caste in Britain: contextualising the British Government's 2017 public consultation on caste and equality law

Introduction

On 28 March 2017 Theresa May's Conservative Government (2015-date) launched a public consultation on [Caste in Great Britain and Equality Law](#). It asked participants to choose between two options for prohibiting caste discrimination by law: Option (1) relying on the development of case law to include caste within the meaning of 'ethnic origins' in section 9 of the Equality Act 2010, or Option (2) specifying caste in the Equality Act. The consultation closed on 18 September 2017; the government's response is expected in early 2018. From its announcement on 2 September 2016, the premise of the consultation was questioned by British Dalit organisations and other civil society actors, given that in 2013 Parliament had amended the Equality Act 2010 by imposing a statutory duty on Government to introduce secondary legislation specifying caste in the Equality Act, 'as an aspect of' the protected characteristic of race – a duty which remains unimplemented. British Dalits have demanded protection *in legislation* from caste discrimination for many years, but have faced concerted opposition not just to legislation but even to raising the issue at all, mainly from faith-based organisations and a handful of politicians and civil society actors, some of whom object to *any* legal protection against caste discrimination including developments in case law which might extend existing Equality Act protection from discrimination based on ethnic origins to discrimination based on caste.

The background

The Equality Act 2010 (EA), introduced by the 2005-2010 Labour Government, does not at present specifically prohibit caste discrimination. British anti-discrimination legislation has never been all-encompassing; it prohibits discrimination on grounds of certain personal characteristics in certain defined areas, outside of which discrimination is lawful. The EA does not cover conduct or behaviour in the private or intimate spheres (e.g. friendships, socialising); discrimination in these areas is not unlawful. The grounds of discrimination, or 'protected characteristics', are extended either by legislation, or by judicial interpretation of existing grounds in cases which come before courts and tribunals (case law).

The Labour Government decided against including an explicit prohibition of caste discrimination in the Equality Bill 2009 (now the Equality Act), arguing that there was no 'strong evidence' of such discrimination in Britain, despite studies by British Dalit organisations (Dalit Solidarity Network, 2006; Anti-Caste Discrimination Alliance, 2009),

evidence in earlier academic research (Nesbitt, 2017), and a UN study on the issue.¹ Instead, it agreed to insert a discretionary power in EA section 9(5)(a) for a Government Minister to amend the EA in the future by order (i.e. secondary legislation) by adding caste as ‘an aspect of’ race. Race is currently defined in EA section 9(1) as including colour, nationality, and ethnic or national origins. Using descent – the international legal category which captures ‘caste’ – was rejected by Parliament in case it opened the door to claims on grounds such as social class.²

In April 2013, section 97 of the Enterprise and Regulatory Reform Act 2013 (ERRA) replaced the discretion in EA section 9(5) with a *duty* to make caste ‘an aspect of’ race (so that caste discrimination would become a subset of race discrimination); but the duty has not been implemented, and it contains no deadline. Section 97 ERRA also permits review and repeal of the duty in section 9(5) or any orders made under it, any time after five years from the adoption of the ERRA i.e. from 26 April 2018 (the ‘sunset clause’).

In July 2013 the Conservative – Liberal-Democrat Coalition Government (2010-2015) published a [timetable](#) for the introduction of secondary legislation on caste ‘through the Equality Act duty’, which included a public consultation; but that consultation never took place. By contrast, the 2017 consultation is not about *how* to introduce caste legislation through the EA duty, but whether legislation is needed at all.

In resisting the duty to add caste to the EA, the Coalition Government and now the Conservative Government have relied on a December 2014 decision by the Employment Appeal Tribunal (EAT) in the case of *Chandhok v Tirkey* which established that, although caste is not yet an autonomous concept within the EA, there may be factual circumstances involving caste which, depending on the facts, may be capable of coming within the ‘ethnic origins’ limb of the definition of race in the EA, as ethnic origins is a ‘wide and flexible’ concept which includes the notion of descent (the category which captures caste under the International Convention on the Elimination of All Forms of Racial Discrimination - ICERD) (Ford, 2015; Dalwai, 2016; Waughray, 2016a; Waughray and Dhanda, 2016). However, the EAT judge stressed that this decision was limited to the facts of the particular case and that he was not making a definitive decision in principle that discrimination on grounds of caste was or was not within the scope of the EA as currently worded.

The Conservative Government ‘agrees that legal protection from caste discrimination is appropriate’³ but says the EAT judgment ‘suggests there is an existing legal remedy for claims of caste-associated discrimination under the ethnic origins element of section 9 [race] of the EA’⁴ i.e. specifying caste as a ground of discrimination in the EA is unnecessary. The consultation document states that the *Tirkey* judgment means that ‘it is likely that anyone who believes that they have been discriminated against on grounds of caste could now bring a race discrimination claim under the existing ethnic origins limb of the race provisions in the EA because of their descent’ (emphasis in original) – especially, it says, as it is not clear what aspects of caste would fall *outside* the concept of ethnic origins.

British Dalit organisations complained that the consultation document was misleading, badly structured, difficult to follow, omitted critical information, and fell short of Government [consultation principles](#). Its purpose, they argued, should have been to inform the introduction of secondary legislation on caste; but it was not. Participants were asked to respond to 17 questions relating to the two options. By presenting case law and legislation as competing ‘options’ for protection from caste discrimination, and promoting case law as the preferred

option and numbering it Option 1 while overstating its advantages and minimising its limitations, the consultation, they insisted, was clearly biased against legislation.

The National Council of Hindu Temples UK (NCHT), an opponent of legislation, was 'delighted' by the consultation announcement on 2 September 2016, describing it as 'wonderful news for the British Hindu community' who could now present evidence justifying their opposition to legislation; but by May 2017 a collection of organisations including the Hindu Council UK, the National Hindu Students' Forum (UK) and the VHP (UK) had condemned the consultation as 'misguided' for appearing to 'presume that caste discrimination exists in the UK', rejecting both options and demanding repeal of EA section 9(5) entirely.⁵ Journalists reported a 'Hindu backlash' against the consultation, with Theresa May 'worried about upsetting powerful Hindu groups' if the consultation went ahead (Purohit, 2017) and 'influential Hindu, Sikh and Jain lobbies denying that caste-based discrimination exists in Britain,' whereas Dalit and other groups 'insist that discrimination exists, making law a necessity' (Sonwalker, 2017b).⁶

Despite their criticisms of the consultation, British Dalit organisations [joined forces](#) urging people to send 'a clear message to the Government that legislation should protect people subjected to caste discrimination' by specifically choosing the option to specify caste in the EA.⁷

Government and political party vacillations

In 2005 when British Dalits initiated their campaign for the inclusion of caste in the Labour Government's proposed new Equality Act, they faced opposition from a political establishment reluctant to acknowledge caste discrimination as a domestic issue, wary of being accused of 'cultural intrusion,' and unconvinced that legal regulation was necessary. They also anticipated a backlash from sections of the Indian diaspora community (Waughray and Dhanda, 2016). During parliamentary debates on the Equality Bill in 2009–2010 the Government resisted attempts to add caste. However, in March 2010, in order to secure agreement on the legislation before the dissolution of Parliament, it agreed to an amendment from the late Lord Avebury (Liberal Democrat) (a humanist, secular Buddhist and advocate of legislation on caste discrimination) inserting the discretionary power in section 9(5)(a). There was another reason: Baroness Thornton, the Government Minister responsible for the Bill, was persuaded to include the 'caste power' after hearing powerful direct testimony from British Dalits. She also commissioned a study from the National Institute of Economic and Social Research (NIESR) on caste discrimination and harassment in Great Britain. This found evidence suggesting discrimination in areas covered by the EA, and it recommended legislation, but was dismissed as flawed research by anti-legislation groups. For over two years the Conservative-dominated Coalition Government deflected calls by British Dalits to utilise the 'caste power', insisting it was 'carefully considering' the NIESR findings - before, in March 2013, announcing education, not legislation, as its chosen approach.⁸

By April 2013 the Coalition Government was facing the loss of a politically important piece of legislation, the Enterprise and Regulatory Reform Bill (now the ERRA). Twice the Lords adopted amendments to the Bill moved by the Right Reverend Lord Harries (a cross-bencher and former Bishop of Oxford) immediately inserting caste as a sub-category of race in the EA - both times rejected by the Commons. Reluctantly, the Government proposed its own amendment which replaced the *discretion* in EA section 9 to make caste an aspect of race with

a *duty* to do so (Waughray, 2014). Its amendment included the sunset clause (which received cross-party support despite being unprecedented in relation to a discrimination ground) allowing the removal of caste legislation ‘once the concept [of caste] has disappeared from UK society’.⁹ The Harries amendments had been supported by the veteran Liberal-Democrat lawyer Lord Lester QC (an initiator of the UK’s first anti-discrimination legislation, the Race Relations Act 1965), Baroness Flather (cross-bench, a Hindu and the first female Asian peer), and Lord Singh (cross-bench) who described caste as ‘negative cultural clutter’ in Hinduism, while denying the existence of caste among Sikhs.¹⁰ In the House of Lords debate on the second Harries amendment on 22 April 2013, Labour peer Lord Bhikhu Parekh, an expert on multi-culturalism, criticised the amendments for adopting the wrong approach (legislation). While untouchability should be countered, he said, there was no evidence of wider caste discrimination; it would be ‘extremely problematic’ to get rid of the category of caste, the hierarchy among categories, or the principle of heredity; caste was too ‘nebulous’ a concept to capture in law, and legislation would only lead to ‘frivolous complaints.’¹¹ Five Conservative Asian peers (Lords Ahmad, Popat, and Sheikh and Baronesses Warsi and Verma) voted against the amendments as did Liberal-Democrats Lords Loomba and Dholakia. Asian peers supporting Harries were (Labour) Lords Patel of Bradford, Parekh, Desai; Lord Hussein (Liberal-Democrat); and crossbenchers Lords Patel, Bilimoria and Singh, and Baroness Flather. On 23 April 2013 the Government’s amendment was adopted in the Commons, and on 24 April 2013 in the Lords (Waughray, 2014).

In late 2013 the UK Equality and Human Rights Commission (EHRC) contracted a team of academic researchers, including the present author, to help develop the required secondary legislation by undertaking socio-legal research on British equality law and caste to identify the relevant legal issues and by holding expert and stakeholder seminars to capture the varied experiences and opinions relevant to implementation of the legislation. Two reports (Dhanda et al, 2014a and 2014b) made proposals for defining caste for the purposes of the EA, collated testimonies of caste discrimination, presented the varied views on legislation, and recommended the addition of caste as a fifth subset of race; but the expected Government action did not follow.

The EHRC had intended to, but did not, commission research to measure the extent of caste discrimination in Britain (baseline information necessary for the review power in the sunset clause) apparently because it felt it ‘might be intrusive and ruin good relations in communities.’¹² Instead the Government commissioned its own [study](#) on the *feasibility* of measuring caste discrimination. This was completed in October 2014 but despite repeated calls remained unpublished until March 2017. The study concludes that there are no significant ethical or methodological barriers preventing a survey measuring the extent of caste discrimination in the UK; yet no survey has been carried out.

Throughout 2014 and 2015, pro-legislation parliamentarians in both Houses who questioned the delay in introducing the legislation were met with the same answer - the Government was ‘considering’ the situation. During a House of Lords debate on caste-based discrimination in July 2016 the Government stated that the ruling in *Tirkey v Chandhok* ‘may well’ already provide ‘the appropriate level of protection that is needed against caste discrimination’ and that it believed the UK was already compliant with its international law obligations on caste.¹³ In August 2016 it asserted before the UN Committee on the Elimination of Racial Discrimination (CERD) that the ‘Equality Act 2010 offered legal protection against discrimination on grounds of ethnic origin, which included caste.’¹⁴

The Indian diaspora and opposition to caste discrimination legislation

Opposition to legislation began to be voiced following DSN's 2006 study on caste discrimination in the UK. Since 2013, concerted opposition to caste legislation in the UK has emerged from various organisations claiming to represent the views of religious communities – Hindus, Sikhs and recently Jains – and from actors such as the Hindu Lawyers' Association and City Hindus Network.¹⁵ Much of this opposition has appeared online in blogposts or in press releases. A recurring claim is that there is no credible and 'universally accepted' proof of caste discrimination in the UK, alternatively no evidence of such discrimination in areas covered by the EA.¹⁶ Yet the existence of discrimination 'based on family background, religious tradition or jaati (caste)' within Hindu communities was recognised in a 2006 Hindu Forum of Britain (HFB) report (Berkeley, 2006: 12, 58). In 2013 the Alliance of Hindu Organisations (AHO) cited Anil Bhanot (Hindu Council UK) saying, 'I am clear in my own mind that discrimination exists...the only difference between us is that we are asking for a different approach to eradicate it' (AHO, 2013); but in 2014 the AHO ridiculed the idea that 'a terrible phenomenon called "caste discrimination"' exists in the UK (AHO, 2014). Evidence of discrimination from Dalit organisations has been dismissed, the NIESR report and the EHRC Caste in Britain reports have been repeatedly attacked as flawed and anti-Indian, and the independence of the EHRC reports and the scholarship of the academics involved has been repeatedly called into question (AHO, 2014; Law, Culture, Religion blog, 2014a, 2015; National Council of Hindu Temples, 2017). Yet no evidence has been produced showing that caste discrimination is non-existent in the UK or that accounts of caste discrimination are mistaken or malign.

Opponents argue that legislation will introduce, re-inscribe or entrench caste identities and boundaries and inter-group tensions amid claims that caste is meaningless, irrelevant, declining or non-existent. Yet the continued relevance of caste identity and caste divisions in Britain irrespective of religion or community and across generations is well-documented (for example by Ghuman, 2015; Dhanda, 2017) and indeed is acknowledged by some who question the value of anti-caste legislation in the diaspora (see for example Jaspal and Takhar, 2016). In 2013 the Government endorsed the erosion of caste (hence their support for the sunset clause): 'We do not believe or accept that caste and caste divisions should have any long term future in Britain' (Grant, 2013). Conversely, opponents of legal protection against caste discrimination claim that legislation threatens 'Indian associational needs', for example the existence of organisations 'based on an extended kinship structure like a jati', that it will undermine Indian communities in Britain, and will result in spurious and malicious claims of caste discrimination against Indian businesses and community organisations (Law, Culture, Religion blog, 2013, 2014b, 2014c); but there is no evidence for this, and these arguments misunderstand how British discrimination legislation works. Specifying caste as an aspect of race in the EA will not affect associational activities or religious rituals, nor will individuals be required to disclose caste identities (Dhanda et al, 2014a; Waughray 2016b). Such arguments position Indian organisations, businesses, and employers as the victims of legislation, which is depicted not as a source of protection from caste discrimination but as a threat to the continued existence of Indian communities (Law, Culture, Religion blog, 2014b, 2014c). Presumably Indians campaigning for protection from caste discrimination are not part of these communities. Caste is framed as a benign cultural or associational identity, delinked from discrimination and inequality (Natrajan, 2012). There is no acknowledgement that discrimination on grounds of caste might be a genuine issue for anyone in the UK, or that the impact and effect of caste

varies, or that the experience of caste is negative for some whilst beneficial for others (Dhanda et al, 2014(a): iii-iv).

Some anti-legislation campaigners have argued, like the Government, that specific legislation is unnecessary because the EAT judgment in *Tirkey* means that legal protection against caste discrimination is already available under the EA through judicial interpretation of the ethnic origins element of race. As Lord Lester QC stated in the 2016 Lords debate on caste discrimination, this view is ‘not sustainable.’¹⁷ The judgment was not a definitive decision in principle on the question of whether mistreatment because of someone’s perceived caste is or is not unlawful under the EA.¹⁸ It does not establish a binding and authoritative precedent that caste is part of race/ ethnic origins; it left it open. Unless and until the Supreme Court establishes a precedent, or a body of jurisprudence develops, the law will remain uncertain (see Dhanda et al, 2014a; Waughray, 2016a). CERD has asked the UK three times to introduce legislation against caste discrimination (in 2003, 2011 and 2016); other UN bodies including the former UN High Commissioner for Human Rights and the EHRC have all called on the Government to comply with the statutory duty to legislate (see e.g. EHRC, 2016: 85).

If ‘within the Indian diaspora there is a huge gap even in acknowledging the social reality of the caste system in the UK’, (Ghuman, 2013: 564), religious ‘hurt’ has become the justification for refusing to discuss caste discrimination. The Sikh Council UK cites the reference to the Sikh faith in the Equality Act explanatory note on caste (Sikh Council UK, January 2015) as a reason for opposing the legislation, even though caste was recognised ‘as an important aspect of the self’ in a small 2016 study of young British Sikhs (Jaspal and Takhar, 2016). Dhanda suggests that opposition to legislation by some Sikh organisations such as Sikh Council UK ‘is connected to the barely hidden fear that the routine way of practising caste-based identities will come under scrutiny’ (Dhanda, 2017) - while affirming that the contestation within the Sikh community on the caste issue is a sign of continuing political and spiritual vitality in the community.¹⁹ Meanwhile, established Hindu organisations and the various religion-based anti-legislation umbrella groups that have emerged since 2013 frame caste discrimination legislation as ‘a hate crime against Hindus and Jains’, ‘racist’, ‘offensive’, ‘Hindu-phobic’, ‘religious persecution’ against a successful minority (NCHT, 2017). The ‘British Hindu community’ has become the subject of ‘a campaign of public vilification’, the Hindu faith ‘desecrated’, said the HFB in 2014. This move to shift the terms of the debate away from the question of addressing discrimination sits badly with Government and EHRC research which emphasises that caste is not religion-specific and is subscribed to by (and affects) members of any or no religion, and that while attitudes and practices of caste have always been regulated or modified by religion, discrimination on grounds of caste is a cross-religion or non-religious phenomenon (NIESR, 2010: vi; Dhanda et al, 2014a:20).

A linked strand of opposition depicts calls for caste discrimination legislation in the UK as part of a wider campaign of transnational Christian proselytism and foreign interference in India’s internal affairs, rooted in disdain for Indian traditions with the aim of pressuring India to extend reservations to Muslims and Christians and augmenting conversions to Christianity. Its proponents assert that the ‘caste system’ is a Western, colonialist, missionary construction and has never existed in India (NCHT, 2017). David Mosse terms this the ‘externalisation of caste’, whereby anti-legislation actors seek to convince Government and Parliament that ‘it is not the Dalit experience of discrimination that motivates the introduction of “caste” into UK equality law, but a persisting (missionary-colonial) cultural imagination that vilifies Hindus and unnecessarily exposes them to litigation, presuming that they practice caste discrimination’ (Mosse, 2016). Yet ‘caste’ clearly has meaning in the UK: the Government’s feasibility study

found that ‘the concept of caste appears to be widely understood’; moreover, ‘an individual’s lack of understanding of the concept does not mean they cannot be discriminated against by others who attribute a caste to that person’ (Howat et al, 2017: 19).

Concluding comments

Legislating against caste discrimination in the UK is not only contentious, it has become highly politicised. Prime Minister David Cameron (2010-2016) reportedly vetoed a proposal agreed by ministers to make caste discrimination unlawful, to avoid legislating on the issue ahead of the 2015 General Election (denied by the Government) (Woolf, 2014). The NCHT (a charity) was scrutinised by the Charity Commission for seemingly encouraging its members to vote Conservative in the 2015 Election because of their anti-legislation stance, in contravention of the rules (Sinha, 2015). Bob Blackman MP, a vocal anti-legislation campaigner, chair of the All Party Parliamentary Group for British Hindus and Conservative MP for Harrow East (which has a large Hindu population) urged the Government in October 2016 to abandon caste legislation, claiming that over 85% of British Hindus consider it ‘unnecessary, ill-considered and divisive’²⁰ (Sonwalkar, 2017a; Ram, 2017).

Dalit Solidarity Network believes that the government is being lobbied ‘at the highest level’ to drop caste discrimination legislation (The Economist, 2015). Lord Desai during a recent House of Lords debate on caste-based discrimination attributed the Government’s resistance to legislation to a ‘very strong ... caste Hindu lobby which is powerful, prosperous and persistent’; the Government, he said, was ‘playing a vote bank game’.²¹ Amrit Wilson believes ‘this is not just about legislation outlawing caste discrimination but a demonstration of the power of right-wing Hindu forces in Britain and their ability to get their own way’ (Wilson, 2017).

Lord Popat claims that the ‘British Indian community’ has left caste behind, and that pushing for legislation will ‘bring to the surface’ ‘irrelevant social forces’ and undermine ‘community cohesion’. Yet for Dalits in Britain – unless one discounts all testimonies and evidence of caste discrimination as mistaken, unreliable, dishonest or malicious – these ‘social forces’ are neither irrelevant nor below the surface, neither has caste been left behind. There is no acknowledgement within the anti-legislation lobby that those who say they have experienced discrimination should be listened to. Instead, by bringing the issue of caste discrimination into the open, Dalit organisations are held responsible for causing hurt and offence to ‘dharmic communities’ – the backlash anticipated by Dalit activists almost two decades ago (Waughray and Dhanda, 2016: 181).

The debate in the UK suggests that legislating against caste discrimination will be contested in other diaspora states, just as it has been at the international level, where UN regulation of caste-based discrimination as a form of descent-based racial discrimination under ICERD is not accepted by India. While the need to legislate against race discrimination is now rarely if ever subject to opposition or scrutiny, legal measures against caste discrimination do not have the same legitimacy and in the diaspora risk being criticised by mainstream politicians as unwarranted cultural intrusion. Yet as Lord Desai pointed out in the Lords debate on caste discrimination in 2016, the proposed UK legislation is ‘a minimal programme for preventing discrimination and bringing our law into line with our UN obligations...this is the law in India...this is not a law which is un-Indian...it is entirely in coherence with India’s constitution and law’.²² The next step in the legal regulation of caste discrimination in the UK is the Government’s response to the public consultation. Its importance for the development of UK

equality law and for legal treatment of caste discrimination in the diaspora cannot be underestimated.

¹ A. Eide and Y. Yokota, UN Sub-Commission on the Promotion and Protection of Human Rights, Second Expanded Working Paper on Discrimination based on Work and Descent; UN Doc. E/CN.4/Sub.2/2004/31.

² HL Deb, Vol 716, col 345, 11 January 2010. Descent is one of five grounds of racial discrimination under the International Convention for the Elimination of all Forms of Racial Discrimination (ICERD) - the others are race, colour, national or ethnic origin - and has been interpreted by the Committee on the Elimination of Racial Discrimination (CERD) to include caste. The term 'caste' does not appear in any international human rights law treaty.

³ UN Doc. CERD/C/GBR/21-23, 16 July 2015, para. 8.

⁴ See e.g. Castes: Discrimination: Written question - HL3664 at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-11-18/HL3664/> (accessed 29 August 2017).

⁵ Hindu Council UK et al, Guidance Notes: "Caste in Great Britain and Equality Law: A Public Consultation, 25 May 2017.

⁶ Pritam Singh explains that some Sikh groups saw a right-wing Hindu (Hindutva) agenda behind opposition to caste legislation and have supported the pro-legislation initiatives (personal correspondence).

⁷ See <http://www.secularism.org.uk/news/2017/06/anti-caste-discrimination-groups-issue-urgent-call-to-participate-in-governments-consultation> (accessed 29 August 2017).

⁸ HC Deb vol 559 col 39WS 1 March 2013.

⁹ HC Deb vol 561 col 790 23 April 2013.

¹⁰ HL Deb vol 734 col 1305 4 March 2013; HL Deb vol 744 col 1306-1307 22 April 2013.

¹¹ HL Deb vol col 1305-1306 22 April 2013. See Dhanda (2015) for a detailed discussion of Lord Parekh's remarks in this debate. He did however vote in favour of the Harries amendment.

¹² HC Deb vol 584 col 140WH 9 July 2014

¹³ House of Lords Debate, Caste-based Discrimination, vol 774, 11 July 2016.

¹⁴ UN Doc. CERD/C/SR.2455, 12 August 2016, para 25.

¹⁵ There are deep divisions in the Sikh community on this issue. A small but vocal section seems to have been won over by certain right-wing Hindu actors and this section is opposed to caste legislation, but very large sections of the Sikh community that include some Dalit groups too support pro-legislative campaigning groups (personal correspondence with Pritam Singh).

¹⁶ See note 5.

¹⁷ See note 13.

¹⁸ *Chandhok & Anor v Turkey*, Appeal No. UKEAT/0190/14/KN, paras 1, 55.

¹⁹ Personal communication.

²⁰ HC Deb vol 616 Caste Discrimination Consultation 27 October 2016

²¹ See note 13.

²² See note 13.

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